SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1438

UNION PAVING COMPANY,

Petitioner,

v.

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

WALTER BIDDLE SAUL,
Counsel for Petitioner.

ROBERT W. SAYRE,
SAUL, EWING, REMICK & SAUL,
Of Counsel.

INDEX

Subject Index

CITATIONS

Cases:

Statutes:

Rules:

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1438

UNION PAVING COMPANY,

Petitioner,

v.

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

To the Honorables the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Union Paving Company, petitioner herein, prays that a writ of certiorari be issued to review the judgment entered in the Court of Claims of the United States in the above entitled case.

I. Summary Statement of Matter Involved

Your petitioner, a Delaware Corporation with its main office in Philadelphia, Pennsylvania, entered into a contract on October 27, 1942, Clca-1579, with the United States, through the Civil Aeronautics Administration, for paving in connection with the Airport at Atlantic City, the work to

be done in accordance with the Proposal, Specifications and Drawings, made part of the contract.

The language of the bidding Proposal called for "Concrete pavement, plain—cement content per cubic yard of concrete to be 6.0 bags (approximate), 6" section with thickened edges, to be constructed one or two lanes at a time in accordance with Specification P-501 . . ."

Schedule P-501 contained specifications for three separate types of concrete, Class A, Class B and Class C, which appeared in paragraph 3/5 thereof. Under the heading of Class A concrete appeared the following words in parentheses,

"For Use Where Severe Climatic Conditions Prevail." Under the heading of Class B concrete similarly was written,

"For Use Where Moderate Climatic Conditions Prevail."

In like fashion under the heading of Class C concrete it was stated,

> "For Use Where Mild Climatic Conditions Prevail."

The cement content per cubic yard of concrete for Class A concrete was 6 bags using the standard method of placement and 5.4 bags using the vibratory method of placement. For Class B concrete, the cement content for the standard method of placement was 5.5 bags and for the vibratory method of placement 4.95 bags. The cement content of Class C paving concrete for standard method of placement was 5 bags and for the vibratory method of placement 4.50 bags.

When the petitioner was ready to begin laying concrete, the petitioner advised the respondent's engineer that as Atlantic City was a location where mild climatic conditions prevail the contractor expected to lay Class C concrete in

accordance with the terms of the contract. The contracting officer, however, declined to permit the use of Class C concrete and advised the petitioner that it would be required to construct the work using Class A paving concrete. The petitioner protested and advised the Regional Manager, Department of Commerce, Civil Aeronautics Administration, that it took exception to the interpretation placed on the contract by the contracting officer.

The contract was performed by the petitioner and the petitioner has been paid the contract price, aside from the controversy involved in this case.

After the completion and acceptance of the work, petitioner submitted its claim based on the difference in cost between the Class A and Class C concrete. The contracting officer wrote petitioner on March 13, 1944, denying the claim. On April 5, 1944, petitioner appealed from the determination of the contracting officer to the Civil Aeronautics Administration, and this appeal was denied in writing under date of July 7, 1944.

All of the above facts are set forth in the Special Findings of Fact of the Court of Claims (R. 18-29). The contract with pertinent portions of the specifications appears at pages 5-17 of the Record.

It has been the petitioner's position throughout these proceedings that the determination of the class of concrete to be used was under the terms of the contract entirely dependent upon a question of fact, to wit, the climatic conditions prevailing at Atlantic City. The Commissioner appointed in this case found as a fact that, from the standpoint of the art of concrete laying, Atlantic City and vicinity are in a location where mild climatic conditions prevail. The respondent excepted to the Commissioner's finding, asking that the word "mild" be stricken and the word "moderate" be substituted therefor. The Special Findings of Fact of the Court of Claims do not include a finding

as to whether moderate or mild climatic conditions prevail at Atlantic City.

On December 2, 1946, the Court of Claims filed Special Findings of Fact and rendered an opinion holding that the petitioner was not entitled to recover as a matter of law, and accordingly dismissed the original petition. The petitioner then filed a timely motion for new trial and the Court of Claims overruled the motion on March 3, 1947.

II. Relevant Parts of Statutes Involved

The Act of February 13, 1925, chap. 229, sec. 3, 43 Stat. 939, as amended by the Act of May 22, 1939, chap. 40, 53 Stat. 752 (U. S. C. A. Title 28, sec. 288 and Supp.) with respect to review of decisions of the United States Court of Claims, provides as follows:

> "(b) In any case in the Court of Claims, including those begun under section 180 of the Judicial Code, it shall be competent for the Supreme Court, upon the petition of either party, whether Government or claimant, to require, by certiorari, that the cause be certified to it for review and determination of all errors assigned, with the same power and authority, and with like effect, as if the cause had been brought there by appeal.
>
> * * * * * * *
>
> "In such cases the Supreme Court shall have authority to review, in addition to other questions of law, errors assigned to the effect that there is a lack of substantial evidence to sustain a finding of fact; that an ultimate finding or findings are not sustained by the findings of evidentiary or primary facts; or that there is a failure to make any finding of fact on a material issue."

III. Statement of Questions Presented

1. Whether the Government may under the terms of the contract in controversy completely disregard that portion of the specifications which makes the type of concrete depend upon the climatic conditions at Atlantic City, and instead direct the use of a particular type of concrete in order to obtain "a pavement of considerable compressive strength" where the application of such standard has no justification under the terms of the contract?

2. Whether the action of the Government in disregarding that portion of the specifications which makes the type of concrete depend upon the climatic conditions at Atlantic City and instead directing the use of a particular type of concrete based upon a standard without justification under the contract (which action compels the contractor to use more cement than is required under the contract) is arbitrary, capricious and completely outside of the contract so that the Government is liable for the extra cost to petitioner notwithstanding the provision in the contract which makes the decision of the contracting officer on certain questions final subject to appeal to the head of the Civil Aeronautics Administration?

3. Whether the Court of Claims should have made a finding of fact that the climatic conditions at Atlantic City are either mild or moderate?

IV. Reasons for the Allowance of the Writ

The decision of the Court of Claims in this case is predicated upon a theory completely antithetical to fundamental principles of law laid down by this court. It rests upon the proposition that those provisions of the specifications which made the climatic conditions at Atlantic City the determinative factor as to the type of concrete required should be

totally disregarded—in effect, that they should be written completely out of the contract.

The Government has taken such a position unequivocally throughout the proceedings. The contracting officer of the Civil Aeronautics Administration specifically rejected petitioner's contention that the climatic conditions governed the determination of the type of concrete and established his own standard based on the alleged necessity of obtaining "a pavement of considerable compressive strength"— a standard not provided for in the contract and completely without justification under its terms. The Government's expert witnesses in testifying at the hearings before the Commissioner and its attorneys in submitting Exceptions to the Commissioner's findings and its Brief before the Court of Claims have adhered closely to the view that the key provisions of the specifications relating to the climatic conditions at the work location should be utterly disregarded as constituting no part of the contract. The judgment entered by the Court of Claims must in the last analysis rest upon this proposition which is so clearly inequitable as to require corrective action by this Court.

This view of the case which was adopted by the Court of Claims is directly contrary to the basic principles governing the interpretation of construction contracts laid down by this Court and universally recognized by the lower federal courts. The first of these fundamental principles is that a construction contract must be read together with the plans and specifications and the complete set of contract documents construed as a whole. *Dermott* v. *Jones*, 2 Wall. 1, 7 (1865); *American Concrete Steel Co.* v. *Hart*, 285 Fed. 322, 326 (C. C. A. 2nd, 1922). The second principle is that in the construction of contracts effect should be given, if possible, to every word, phrase, clause and sentence. *Merrill-Ruckgaber Co.* v. *United States*, 241 U. S. 387, 392 (1916); *Rushing* v. *Manhattan Life Ins. Co. of New York*,

224 Fed. 74, 76 (C. C. A. 8th, 1915); *Cities Service Gas Co.* v. *Kelly-Dempsey & Co., Inc.*, 111 F. 2d 247, 249 (C. C. A. 10th, 1940).

It is submitted that this Court should allow the writ on the ground that the Court of Claims has interpreted the Government contract in controversy in a way which conflicts with the applicable decisions of this Court, and for the further reason that by its decision the Court of Claims has in effect rewritten the terms of an existing contract, writing out of the contract at the behest of the Government specific provisions favorable to the private contractor. This decision establishes the inequitable precedent that while the Government can enforce against a private contractor all of the provisions of a contract, the Government can nonetheless disregard with impunity certain of the provisions which turn out to be detrimental to it. Basic principles of equity and justice require rectification of this result.

The petitioner therefore prays that this petition for a writ of certiorari to review the judgment of the Court of Claims of the United States be granted.

Respectfully submitted,

UNION PAVING COMPANY,
By WALTER BIDDLE SAUL,
Counsel for Petitioner.

ROBERT W. SAYRE,
SAUL, EWING, REMICK & SAUL,
Of Counsel.

Philadelphia, Pennsylvania.
May —, 1947.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I. Opinion of the Court Below

The opinion of the Court of Claims was written by Judge Whitaker and filed December 2, 1946. As of the date of preparation of this brief, this opinion has not been officially reported. The opinion will be found on pages 29 to 35 of the record. The Special Findings of Fact will be found in the record on pages 18 to 29 and the Conclusion of Law on page 29.

Petitioner's motion for a new trial was overruled by the Court of Claims on March 3, 1947, without opinion (R. 35).

II. Jurisdiction

The jurisdiction of this Court is invoked under the Act of February 13, 1925, chap. 229, sec. 3, 43 Stat. 939, as amended by the Act of May 22, 1939, chap. 40, 53 Stat. 752 (U. S. C. A. Title 28, sec. 288 and Supp.).

The Court of Claims has decided a question of federal law in conflict with the applicable decisions of this Court. This is a reason for review on writ of certiorari which is included among those set forth in paragraph 5 of Rule 38 of the Rules of your Honorable Court as construed in conjunction with paragraph 3 of Rule 41.

III. Statement of Case

The petition for writ of certiorari contains a statement of the case and of the questions involved, as well as a statement of the facts material to their consideration. In the interest of brevity the questions involved and the material facts are not repeated here.

IV. Specification of Errors to Be Urged

1. The Court of Claims erred in holding as a matter of law that under the terms of the contract in issue, the contracting officer was justified in requiring the petitioner to lay Class A concrete.

2. The Court of Claims erred in holding as a matter of law that the ruling of the contracting officer which required petitioner to lay Class A concrete was final and conclusive under the facts of this case.

3. The Court of Claims erred in holding as a matter of law that the ruling of the contracting officer which required petitioner to lay Class A concrete was neither arbitrary, nor capricious, nor so grossly erroneous as to imply bad faith.

4. The Court of Claims erred in neglecting to find as a fact whether Atlantic City and vicinity are in a location where mild or moderate climatic conditions prevail within the meaning of the contract in controversy.

5. The Court of Claims erred in holding as a matter of law that petitioner is not entitled to recover and in dismissing the original petition.

V. ARGUMENT

1. The specifications incorporated in the contract clearly make the required type of concrete depend upon a factual determination as to the climatic conditions prevailing at Atlantic City, New Jersey, and the Government may not disregard such provisions of the specifications and direct the use of a particular type of concrete in order to obtain "a pavement of considerable compressive strength" where the application of such a standard has no justification under the terms of the contract.

As previously pointed out in the Summary Statement of the Matter Involved, Schedule P-501 which was included in the specifications provided for three distinct types of concrete, Class A, Class B and Class C, each of which required a different cement content. It was also pointed out that in that schedule under the heading of Class A concrete appeared in parentheses the following words:

"For Use Where Severe Climatic Conditions Prevail". Under the heading of Class B concrete there was written in parentheses:

"For Use Where Moderate Climatic Conditions Prevail". Similarly under the heading of Class C concrete it was stated in parentheses:

"For Use Where Mild Climatic Conditions Prevail".

Throughout the course of dealings between the Government and petitioner subsequent to the execution of the contract, the Government has consistently taken the position that the words in parentheses quoted above are not a part of the contract and cannot be relied upon by the petitioner. Thus in denying the petitioner's claim for the difference in cost between Class A and Class C concrete,

the contracting officer in a letter dated March 13, 1944, took the position that the Government had the right to determine the desired cement content, that the purpose for which the airport was to be used would dictate the requirements since it would determine the compressive strength required, and that "the climatic conditions for the locality in which an airport is to be constructed would not necessarily be the determining factor on which the Government would base its cement content stipulation". The contracting officer proceeded to justify the requirement of the use of Class A concrete on the ground that the Civil Aeronautics Administration desired "a pavement of considerable compressive strength". See Special Finding of Fact No. 11 of the Court of Claims (R. 28-29).

The Government has reiterated this contention several times during the course of the proceedings before the Court of Claims—through the testimony of its expert witnesses, through its Exceptions to the Findings of Fact of the Commissioner and through its Brief submitted to that Court. The difficulty with the Government's position is that the contract itself contains no provision which could by any stretch of the imagination justify an interpretation that the contracting officer could choose the type of concrete based upon a desire to obtain "a pavement of considerable compressive strength." In reality the Government's position is that it intended to reserve the right to select the type of concrete, but as was said in *New York Central R. R. Co.* v. *Mohney,* 252 U. S. 152, 157 (1920), "The mental purpose of one of the parties to a written contract cannot change its terms." See also in this connection, *Calderon* v. *Atlas Steamship Company,* 170 U. S. 272, 280 (1898).

The expressed intention of the parties to the contract in question was clear. The type of concrete was to depend upon a simple factual determination, *i.e.,* whether the cli-

mate at Atlantic City was mild, moderate or severe. The contracting officer has refused to make the required determination despite many requests on the part of petitioner that he do so.

The petitioner was bound by all of the terms of the specifications. The Government has never maintained that any portion of the specifications was not binding upon the petitioner. The Government has merely contended that the Civil Aeronautics Authority was free to disregard certain provisions of the specifications. The Government should be bound by all of the terms of the specifications just as much as the contractor. The contract was drawn by the Government, and if it failed to specify and obtain the options and privileges it desired, it cannot now complain. The contract should have been construed most strongly against the Government which prepared it. See *E. I. Du Pont de Nemours & Co.* v. *Claiborne-Reno Co.*, 64 F. 2d 224, 228 (C.C.A. 8th, 1933) and authorities there cited.

The Government has been consistent throughout these proceedings in adhering to the position that the references to the climatic conditions prevailing at Atlantic City which were set forth in parentheses in Specification P-501 were merely for the guidance of the Government's engineers and did not constitute part of the contract. Further, it is submitted that the judgment of the Court of Claims can be sustained only by reliance upon such a theory.

The basic proposition underlying the Government's case is not only inequitable but it is also directly contrary to well established principles governing the interpretation of construction contracts laid down by this Court and followed by the lower federal courts. The first of these fundamental principles is that a construction contract must be read together with the plans and specifications and the complete

set of contract documents construed as a whole. *Dermott* v. *Jones*, 2 Wall. 1, 7 (1865); *American Concrete Steel Co.* v. *Hart*, 285 Fed. 322, 326 (C.C.A. 2nd, 1922). The second principle is that in the construction of contracts effect should be given if possible to every word, phrase, clause and sentence. *Merrill-Ruckgaber Co.* v. *United States*, 241 U. S. 387, 392 (1916); *Rushing* v. *Manhattan Life Ins. Co. of New York*, 224 Fed. 74, 76 (C.C.A. 8th, 1915); *Cities Service Gas Co.* v. *Kelly-Dempsey & Co., Inc.*, 111 F. 2d 247, 249 (C.C.A. 10th, 1940).

The Government has also contended, and the Court of Claims seems to have held, that the provisions of the Proposal which called for the use of "6.0 bags (approximate)" amounted to a specification by the contracting officer that Class A concrete should be used. This argument is without merit in view of the fact that the word "approximate" was used. Either Class A, B or C could have been used under that wording. It was an indefinite designation of the type of concrete requiring reference to the specifications to determine the intention of the parties, and the specifications established the factual test of the climatic conditions at Atlantic City. In this aspect of the case the Court of Claims appears to have disregarded its former holding in the analogous case of *P. Sanford Ross, Inc.*, v. *United States*, 50 C. Cls. 168 (1915).

Since this decision of the Court of Claims is so directly in conflict with the precedents long established by this Court, and since it establishes the unjust principle that the Government can disregard certain provisions of its contract with a private corporation which turn out to be detrimental to the Government, but still can enforce all of the other provisions of the contract against the private contractor, it is submitted that this Court should grant the writ of certi-

orari. This is the central problem in his case and the other questions to be discussed briefly hereafter are subordinate to this basic question.

2. The specification of class A concrete by the contracting officer in order to obtain a pavement of considerable compressive strength was arbitrary, capricious and completely outside of the contract so that the Government is liable for the extra cost to petitioner notwithstanding the provision in the contract making the decision of the contracting officer on certain questions final subject to appeal to the head of the Civil Aeronautics Administration.

The Court of Claims took the alternative position that the interpretation placed upon the contract by the contracting officer was not arbitrary, capricious or so grossly erroneous as to imply bad faith and that therefore his interpretation was final and conclusive under Article A9 of Exhibit B to the proposal.

Petitioner maintains that there was only one possible construction of this contract and that was, as previously set forth, that the type of concrete depended upon the climatic conditions at Atlantic City. This was a fact to be determined by the contracting officer but the latter has refused to make any determination as to such fact and the Government has consistently taken the position that the climate at Atlantic City has no bearing on the issue. In directing the use of Class A concrete, the contracting officer was in effect ordering the petitioner to perform extra work not contemplated by the contract. He had no discretion under the contract to specify Class A concrete in the absence of a finding that a severe climate prevailed at Atlantic City. Neither the contracting officer, nor the Government during these proceedings, have ever maintained such to be a fact. Rather, the contracting officer stated in his letter of March 13, 1944,

that the reason for directing the use of Class A concrete was the desire to obtain "a pavement of considerable compressive strength." There was no basis in the contract for determing the type of concrete based on such a consideration. In basing his decision on such a factor, which was completely outside of the contract, and completely disregarding the standard established in the contract, the contracting officer acted arbitrarily and capriciously, and in such a way, that he could not properly be considered as interpreting the specifications.

It is submitted therefore that Article A9 of Exhibit B to the Proposal has no application to this controversy and the basic question in the case can be determined by the Court on the basis of the proper interpretation of all the contract documents.

3. The Court of Claims should have made a finding of fact that the climatic conditions at Atlantic City are either mild or moderate.

If the petitioner's contention with regard to the proper construction of the contract is sustained, it follows that the Court of Claims should have made a finding of fact as to the climatic conditions prevailing at Atlantic City since that fact determines the type of concrete required under the contract. The Commissioner found as a fact that, from the standpoint of the art of concrete laying, Atlantic City and vicinity are in a location where mild climatic conditions prevail. The respondent excepted to this finding, requesting the Court of Claims to find that the climate at Atlantic City is moderate rather than mild. The Court of Claims made no finding of fact on this point and it is submitted that its failure to do so constitutes reversible error. Accordingly the judgment of the Court of Claims should be

reversed, and the case remanded with instructions to the Court of Claims to make the necessary finding on this point and to enter a judgment based thereon.

VI. Conclusion

For the foregoing reasons it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

WALTER BIDDLE SAUL,
Counsel for Petitioner.

ROBERT W. SAYRE,
SAUL, EWING, REMICK & SAUL,
Of Counsel.